

CHAPTER 6
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6.1. PRELIMINARY INQUIRY

If there is no out of home placement of the child requested, the court process may begin with a preliminary inquiry.¹ The purpose of both the preliminary inquiry and the preliminary hearing is for the judge or referee to determine whether a case should be placed on the formal calendar.² The preliminary inquiry is an informal review by the court to determine appropriate action on a petition³ and may be conducted by a referee.⁴ There is no requirement by statute or court rule that the parties receive notice or that they be present, and there is no time limit for conducting a preliminary inquiry. At the preliminary inquiry the court may dismiss the complaint or deny authorization of the petition, refer the matter to alternative services, or authorize the filing of a petition.⁵ A petition may be authorized upon a showing of probable cause that one or more of the allegations in the petition are true and fall within MCL 712A.2(b).⁶ Consistent with the definition of "preliminary inquiry" as an informal review by the court, the quality of evidence to support a showing of probable cause is discretionary with the court. The rule says that probable cause "may be established with such information and in such manner as the court deems sufficient" so that a hearing with the presence of parties is not strictly required.⁷

If parents are present at the preliminary inquiry, they are to be advised of their right to retain counsel and, if they are indigent, that the court will appoint counsel for them on request.⁸ The child protection law⁹, the juvenile code¹⁰ and the court rules¹¹ all require that the court appoint a legal representative for the child. The rules say, "The court must

¹MCR 5.962(A)

²MCL 712A.11(2) provides that in protection proceedings "a preliminary inquiry may be made to determine whether the interests of the public or of the child require that further action be taken. If it appears that formal jurisdiction should be acquired, the court shall authorize a petition to be filed."

³ MCR 5.903(A)(17)

⁴ MCR 5.913(A)(1). Parties have a right to a judge only at hearings on the formal calendar. MCR 5.912(A)

⁵ MCR 5.962(B)

⁶ MCL 712A.13a(2), MCR 5.962(B)(3)

⁷ MCR 5.962, final paragraph.

⁸ MCR 5.915(B)(1)(a)

⁹ MCL 722.630

¹⁰ MCL 712A.17c(7)

¹¹ MCR 5.915(B)(2)

appoint an attorney to represent the child at every hearing. (Emphasis added.) Thus if the court conducts a preliminary inquiry in the nature of a hearing -- even an informal hearing -- the rules require appointment of counsel for the child. Even though the rules do not require taking of testimony, reviewing evidence, or appearance of parties at preliminary inquiry, when these occur, the inquiry takes on the characteristics of a hearing and appointment of counsel for the child seems required. If, however, the preliminary inquiry is conducted as an informal review of the petition only, with no hearing, appointment of counsel for the child seems unnecessary.

The statute says that the court may authorize a petition to be filed at the conclusion of a preliminary hearing or inquiry.¹² Authorization of a petition seems necessary to set the matter on the formal calendar but the court has the option of holding a preliminary inquiry or hearing when placement of the child is not requested. The Michigan Supreme Court in *Hatcher* held that the valid exercise of the juvenile court statutory jurisdiction is established by the contents of the petition after the judge or referee has found probable cause to believe that the allegations of the petition are true.¹³ *Hatcher* also seems to say that the subject matter jurisdiction of the court is established when the petition is authorized and the matter placed on the formal calendar -- a function of the Preliminary Inquiry when the petitioner does not seek placement of the child.

6.2. PRELIMINARY HEARING

6.2.1. *When Required*

Although a preliminary hearing may be held to consider authorizing a petition when the child is not in placement or placement is not requested, preliminary hearing is required if the child is in temporary placement¹⁴ or the petition is accompanied by a request that the child be placed.¹⁵ "Placement" is defined as "court-approved removal of a child from the parental home and placement in foster care, in a shelter home, in a hospital, or with a private treatment agency."¹⁶

6.2.2. *Time Limits*

If the child has been taken into custody, the preliminary hearing must commence within 24 hours, after the child is taken into court custody, excluding Sundays and holidays and unless adjourned for good cause shown. If not, the child must

¹² MCL 712A.13a(2)

¹³ *In re Hatcher*, 443 Mich 426 (1993)

¹⁴ MCR 5.965(A)

¹⁵ MCR 5.965(C)

¹⁶ MCR 5.903(C)(5)

be released.¹⁷ If the child is in placement, the preliminary hearing may be adjourned for up to 14 days to secure appearance of witnesses or for other good cause shown.¹⁸ There is no time requirement for conducting a preliminary hearing when a child is not in court custody.

6.2.3. *Notice to Parent or Custodian*

6.2.3.1. *Child in Custody*

When a child is placed, notice of the preliminary hearing shall be given to the parent of the child as soon as the hearing is scheduled and the notice may be in person, in writing, on the record or by telephone.¹⁹ Note that "parent" under the rules means "a person who is legally responsible for the control and care of the minor, including a mother, father, guardian, or custodian, other than a custodian of a state facility, a guardian ad litem, or a juvenile court-ordered custodian."²⁰ When a child is taken into custody and the person summoned is other than the parent or guardian, the parent or guardian must also be personally notified of the preliminary hearing.²¹

6.2.3.2. *Child not in Custody*

When a child is not in court custody, the parents must be served by summons.²² The summons must be personally served 3 days before the hearing, or it must be served by registered mail at least 10 days before the hearing when the party to whom the summons is addressed resides outside of Michigan.²³

If personal service of the summons is impracticable or cannot be achieved, the court may direct that it be served by registered or certified mail addressed to the last known address of the party, return receipt requested and restricted to the addressee.²⁴ If the court finds that service cannot be made because the whereabouts of the person to be summoned has not been determined after reasonable effort, the court may direct any manner of substituted service, including publication.²⁵ If the court finds personal service of a summons is

¹⁷ MCR 5.965(A)

¹⁸ MCR 5.965(C)(1)

¹⁹ MCR 5.920(C)(2)(b)

²⁰ MCR 5.903(A)(12)

²¹ MCL 712A.12

²² MCR 5.920(B)(1)&(2)

²³ MCR 5.920(B)(5)(a)(iii)&(b)

²⁴ MCR 5.9209(B)(4)(b)

²⁵ MCR 5.9209(B)(4)(c)

unnecessary, the court may direct that it be served in a manner reasonably calculated to provide notice.²⁶

²⁶ MCR 5.9209B)(4)(d)

6.2.4 Procedure

6.2.4.1. Referee and Lawyer-Guardian-ad-litem

A referee may conduct a preliminary hearing. Parties are entitled to a judge only at hearings on the formal calendar.²⁷ The referee hearing a preliminary hearing need not be licensed to practice law.²⁸ The child must be represented by a lawyer guardian-ad-litem at all child protective proceedings, including the preliminary hearing but the court may make temporary orders to protect the child pending the appearance of counsel for the child or pending completion of the preliminary hearing.²⁹

6.2.4.2. Notification of Parents

The court is to determine whether the parent or parents have been notified and, if not present, direct that an attempt be made to get them there.³⁰ The preliminary hearing may be adjourned to secure the presence of a parent or may be conducted in the parent's absence.³¹

6.2.4.3. Read Allegations; Possibly Dismiss or Refer to Alternative Services.

The court is to read the allegations in the petition in open court, unless waived. The court is then to determine if the petition should be dismissed or the matter referred to alternative services. If dismissed or referred, the court shall release the child. If the petition is not dismissed or if the matter is not referred to alternative services, the court should continue with the hearing.³²

6.2.4.4. Advise Parents of Rights; Inquire as to Tribal Status

The court shall advise the respondent of the right to assistance of attorney³³ as discussed above and of the right to a trial on the allegations in the petition and that the trial may be before a referee

²⁷ MCR 5.903(A)(6) and MCR 5.912(A)

²⁸ MCR 5.913(A)(3) *Child Protective Proceedings*. Only a person licensed to practice law in Michigan may serve as a referee at a child protective proceeding other than a preliminary inquiry, preliminary hearing, or a progress review under MCR 5.973(D)

²⁹ MCR 5.965(B)(2)

³⁰ MCR 5.965(B)(1)

³¹ *Id.*

³² MCR 5.965(B)

³³ *In re Powers/Cribbs/Weaver Minors*, 244 Mich App 111; 624 NW2d472 (2000)

unless a judge or jury is requested pursuant to MCR 5.912 or 5.913. The court is also required to inquire if the child or parent is a registered member of any American Indian tribe or band.³⁴

6.2.4.5. *Proofs*

At this point the court will generally ask the petitioner to present the facts of the case upon which the court is to base its determination to authorize the petition or not. Parents are to be allowed an opportunity to deny or admit the allegations and make a statement of explanation.³⁵ If placement of the child is sought, the parents are to be given an opportunity to cross-examine witnesses, to subpoena witnesses, and to offer proof to counter the allegations against them.³⁶

6.2.5. *Authorization of the Petition*

Unless the preliminary hearing is adjourned (only for up to 14 days³⁷), the court shall decide whether to authorize the filing of the petition. The petition may be authorized upon a showing of probable cause that 1 or more of the allegations in the petition are true and fall within the provisions of MCL 712A. 2(b).³⁸ The court may permit the respondent to waive the probable cause determination.³⁹ The court shall indicate whether permanent or temporary custody is sought and must direct that the respondent and attorney for the child receive a copy of the petition authorized to be filed.⁴⁰

6.2.6. *Quality of Evidence*

6.2.6.1. *No Placement of Child*

If a preliminary hearing is held when the child is not in custody or placement is not sought, presumably the quality of evidence relied upon by the court to authorize the petition is the same as that required in preliminary inquiry. In preliminary inquiry the showing of probable cause may be established with such information and in such manner as the court deems sufficient⁴¹ thus giving the court broad discretion as to the quality of evidence relied upon.

³⁴ Id.

³⁵ MCR 5.965(B)(8)

³⁶ MCR 5.965(C)(1)

³⁷ MCR 5.965(C)(1)

³⁸ MCL 712A.13a(2), MCR 5.965(B)(9)

³⁹ MCR 5.965(C)(1)

⁴⁰ MCR 5.965(B)(9)

⁴¹ MCR 5.962

6.2.6.2. *Placement of Child Sought*

If placement is sought at preliminary hearing the court still has considerable latitude on evidentiary questions. The court's findings must be in writing or on the record and may be based on "hearsay evidence that possesses an adequate degree of trustworthiness."⁴²

6.2.7. *Protective Orders; Remove the Danger and Not the Child*

6.2.7.1 *Disrupt the Child As Little As Possible – Consistent with Child Safety*

The preference of the law is to keep children with their families as much as possible. Both the U.S. and Michigan Constitutions recognize and protect a private realm of family life. The preamble to the Michigan Juvenile Code creates a presumption that the child remains in his own home when it says:

This chapter shall be liberally construed so that each juvenile coming within the court's jurisdiction receives the care, guidance and control, preferably in his or her own home conducive to the juvenile's welfare, and the best interests of the state. If the juvenile is removed from the control of his or her parents, the juvenile shall be placed in care as nearly as possible equivalent to the care that should have been given to the juvenile by his or her parents.⁴³

Federal law requires that reasonable efforts be made to prevent removal of the child before the state is eligible for federal reimbursement for the cost of foster care.⁴⁴ Under Michigan law, before placing a child, the court must determine that custody with the parents presents "a substantial risk of harm to the life, physical health, or mental well-being of the child" and that "no provision of service or other arrangement except removal of the child is reasonably available to adequately safeguard the child."⁴⁵ Thus the law's preference is for acting to protect the child in the child's own home without placement, if at all possible. Protective orders from the court can be very valuable in removing the danger and not the child. The law allows other protective orders at Preliminary Hearing, including the ability to remove the alleged perpetrator from the home.

⁴² MCR 5.965(C)(3)

⁴³ MCL 712A.1(3)

⁴⁴ 42 USC 670 et seq.

⁴⁵ MCR 5.965(C)(2)(a)&(b)

Child safety is paramount, however. The legislature has made it abundantly clear that while child safety may be achieved by measures other than removal of the child from his or her home, there is to be so compromises on the overall safety of the child. The statute provides that the court is not to leave the child in the home, return the child to the home or place the child with a person not licensed to provide foster care, unless it finds that the conditions of custody at the placement and with the individual are adequate to safeguard the child from risk of harm to the child's life, physical health, or mental well-being.⁴⁶

6.2.7.2 Reasonable Terms and Conditions

If the court releases the child to the parents following authorization of the petition, the court has authority to enter protective orders as "reasonable terms and conditions necessary for either the physical health or mental well-being of the child."⁴⁷ For example, the court may order that the parent attend counseling, submit to random drug screens, allow homemakers or prevention workers into the home on a regular basis, or exclude certain individuals from the household that may present a danger to the child.

6.2.7.3 Excluding the Alleged Perpetrator from the Child's Home

The court may also exclude a person, including a parent, from the home upon certain findings.

(4) The court may order a parent, guardian, custodian, nonparent adult or other person to leave the home and, except as the court orders, not to subsequently return to the home if all of the following take place:

- (a) A petition alleging abuse or the child by the parent, guardian, custodian, nonparent adult, or other person is authorized under section [MCL 712A.13a(2)].
- (b) The court after a hearing finds probable cause to believe the parent, guardian, custodian, nonparent adult, or other person committed the abuse.
- (c) The court finds on the record that the presence in the home of the person alleged to have committed the abuse present a substantial risk of harm to the child's life, physical health, or mental well-being.⁴⁸

⁴⁶ MCL 712A.13a(5)

⁴⁷ MCL 712A.13a(3), MCR 5.965(B)(10)

⁴⁸ MCL 712A.13a(4)

In determining whether to enter an order excluding the alleged perpetrator as provided above, the court may consider whether the parent who is to remain in the child's home is married to the person to be removed or has a legal right to retain possession of the home.⁴⁹ Thus where there is a husband and wife with joint tenancy in a dwelling or a couple who both have a legal right to the premises, the court may exclude one from the home, leaving the children in the home with a person with a legal right to possession.

An order excluding an alleged perpetrator may also contain 1 or more of the following terms or conditions:

- (a) The court may require the alleged abusive parent to pay appropriate support to maintain a suitable home environment for the child during the duration of the order.
- (b) The court may order the alleged abusive person, according to terms the court may set, to surrender to a local law enforcement agency any firearms or other potentially dangerous weapons the alleged abused person owns, possesses or uses.
- (c) The court may include any reasonable term or condition necessary for the child's physical or mental well-being or necessary to protect the child.⁵⁰

Other means of protecting the child may be available through other courts if proceedings are pending there. Personal protection orders may be useful in this regard as could a court order arising out of a pending criminal matter requiring no contact between an alleged offender and the child or the family as a condition of bond pending trial. Be sure to inform law enforcement and those other courts that the child protection action is underway and to make some efforts to coordinate the various judicial activities.

6.2.8. Preliminary Hearing Orders Governing Pretrial Placement and Parenting Time

See Chapter 4, **PLACEMENT**

⁴⁹ MCL 712A.13a(6)

⁵⁰ MCL 712A.13a(7)

6.3. PARTIES/STANDING

The court rules define who has party status in child protection proceedings:

"Party" includes the *** (b) petitioner, child, respondent parent or other parent or guardian in a protective proceeding.⁵¹

"Petitioner" is defined as the "person or agency who requests the court to take action against a juvenile or on behalf of a child."⁶² For a discussion of who may file a petition see Chapter 5.3 **PETITION**.

In *Tallman*⁵³, the Court of Appeals addressed the standing of foster parents, not in child protection but in an analogous proceeding under the child custody act. In addressing the standing of foster parents under the child custody act, the court said that foster parents are excluded from bringing such cases because they are paid under contract to help facilitate family reunification. Foster parents typically sign an "Agency/Foster Parent Agreement" with the FIA in which they agree to cooperate with the FIA in possibly reuniting the child with natural parents. The creation of a new family or the encouragement of permanent emotional ties between the child and the foster parents are not foster care goals, said the court. "Foster care is designed to provide a stable, nurturing, non-institutionalized environment for the child while the natural parent or caretaker attempts to remedy the problems which precipitated the child's removal or, if parental rights have been terminated, until suitable adoptive parents are found."

Foster parents must be consulted by the caseworker and the child's lawyer-guardian ad litem. They receive notice of certain hearings and most judges encourage them to attend court hearings.

6.4. INITIAL SERVICES PLANS

From a social work perspective, families seem most receptive to rehabilitation close to the point of crisis rather than weeks later. In an effort to balance the interest in providing meaningful and prompt services to families with the interest in preserving due process rights, the law requires that the department prepare an initial services plan within 30 days of the child's placement but that participation in the plan is voluntary without a court order. The court must inform the parties orally or in writing of the department's obligation to prepare a plan and that cooperation, without a court order, is voluntary.⁵⁴ In many cases, with advise of counsel, parents will choose to cooperate

⁵¹ MCR 5.903(A)(13)

⁵² MCR 5.903(A)(16)

⁵³ *Tallman v. Milton*, 192 Mich App 606 (1992)

⁵⁴ MCL 712A.13a(8); MCR 5.965(C)(6)

fully with the department's intervention efforts. In other cases, the factual and legal questions about whether the court should have jurisdiction or what the proper disposition ought to be are so substantial that the parents will choose not to cooperate unless an order is entered by the court.

The initial services plan is to include:

- (i) the background of the child and the family;
- (ii) an evaluation of the experiences and problems of the child;
- (iii) a projection of the expected length of stay in foster care; and
- (iv) an identification of specific goals and projected time frames for meeting the goals.⁵⁵

Upon motion of any party, the court shall review custody and placement orders and initial services plans pending trial and may modify those orders and plans in the best interests of the child.⁵⁶

Under what circumstances may the court order services for a child or its parents prior to adjudication? The court may enter orders for evaluation of parents and children prior to adjudication.⁵⁷ Apart from orders necessary to protect a child when released to a parent under “reasonable terms and conditions” pursuant to MCL 712A.13a(3), there seems to be no authority for the court to order treatment prior to adjudication and disposition without the parent's consent.

⁵⁵ MCR 5.965(C)(6)(c)

⁵⁶ MCL 712A.13a(12), MCR 5.965(C)(8)

⁵⁷ MCL 712A.12, MCR 5.923